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No. 00-

IN THE

Supreme Court of the United States

W. HAROLD SELLERS and ROBERT DUPRE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether venue for a 18 U.S.C. § 1957 money-laundering offense is properly triable in the Eastern District of Louisiana — even though Petitioners did not come into possession of any criminally derived proceeds in that district – as would be required by under *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), and decisions of the Second, Tenth, and Eleventh Circuits.

Whether the retroactive application of *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997) — and its finding that materiality is not an element of 18 U.S.C. § 1014 — violated the *ex post facto* clause of the United States Constitution.

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Petitioners, W. Harold Sellers and Robert Dupre, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in this case.

OPINIONS BELOW

The June 30, 2000, opinion of the Fifth Circuit is unreported and is reproduced at Appendix ("App.") A hereto at 1a-3a. The July 7, 1999, underlying order of the district court denying Petitioners' motion for Certificate of Appealability on two of the issues forming the basis of this Petition is unreported and reproduced at Appendix B hereto at 4a-19a. The September 24, 1999, underlying order of the district court that denied Petitioners' motion for reconsideration of the July 7, 1999, Order is unreported and reproduced at Appendix C at 20a-23a. The order of the Fifth Circuit denying Petitioners' motion for rehearing is unreported and reproduced at Appendix D hereto at 24a-25a.

GROUNDS FOR JURISDICTION

The judgment of the Fifth Circuit was issued on June 30, 2000. Petitioners filed a Motion for Rehearing on July 13, 2000, which was denied on August 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the United States Constitution, provides in relevant part that "No Bill of Attainder or ex post facto Law shall be passed."

The Fifth Amendment of the United States Constitution, which provides in relevant part that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment of the United States Constitution, which provides in relevant party that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law. . . ."

18 U.S.C. §§ 1014 and 1957, which are reprinted in Appendix E.

STATEMENT OF THE CASE

The Petitioners were indicted on August 13, 1995. The indictment alleged sixteen counts of criminal conduct, including two counts of bank fraud pursuant to 18 U.S.C. § 1344, three counts of false statement pursuant to 18 U.S.C. § 1014, nine counts of money-laundering pursuant to 18 U.S.C. § 1957, and conspiracy to commit bank fraud pursuant to 18 U.S.C. § 371.

A. The Issue of Proper Venue for the Money-laundering Counts.

The money-laundering counts of the indictment specifically alleged ". . . wire transfers in the following amounts from a domestic bank in Houston Texas to the following foreign and domestic accounts, such property having been derived from a specified unlawful activity, that is bank fraud as charged in Count 2."

The instructions from the district court to the petit jury specifically required the jury to find that the transactions involved in the money-laundering to have come from the bank fraud proceeds as charged in Count 2.

The jury found petitioners guilty of the money-laundering counts 7-15.

B. The Issue of Retroactive Application of the Wells Decision.

At the time of petitioners' three-week jury trial beginning August 1, 1994, and at the time of the bank fraud, false statement, and money-laundering offenses in December of 1988, the law in the Fifth Circuit held materiality to be an element of §§ 1014 and 1344. The government was required to prove materiality. The Court instructed the jury that materiality was for the Court to decide.

The United States Supreme Court decided the case of *Wells v. United States* in 1997, after the indictment and trial of petitioners. This decision removed materiality as an element from § 1014. The Fifth Circuit applied the holding of *Wells* as to materiality in their decision to affirm petitioners' conviction on direct appeal, 117 F.3d 810 (1997), *cert. denied*, 522 U.S. 1078, 118 S. Ct. 857.

Petitioners filed a Motion to Vacate and set aside their convictions under 28 U.S.C. § 2255 and urged both of Issues A and B herein. The district court denied their motion, and refused to grant a certificate of appealability on these issues. The district court held in its Order of July 8, 1999, that money-laundering was a continuing offense and that venue was proper where the underlying substantive offense occurred. [App. B at 8a]. The district court also held that in the light of *Wells* the failure to allow the jury to decide the issue of materiality was not *Gaudin* error, and was not prejudicial. [App. B at 14a].

The Petitioners separately sought a certificate of appealability in the Fifth Circuit on several issues, including the two forming the basis for this Petition. The Fifth Circuit denied this Motion for Certificate of Appealability on June 30, 2000, and then denied Petitioners' Motion for Rehearing on August 8, 2000. [App. A; App. D].

Petitioners seek the issuance of a Writ of Certiorari relating to the improper venue of the money-laundering convictions, and the retroactive application of *United States v. Wells*.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO VENUE SQUARELY CONFLICTS WITH THE DECISIONS OF THE FIRST, SECOND, FOURTH, SEVENTH, TENTH, AND ELEVENTH CIRCUITS.

The Petition should be granted because the Fifth Circuit decision is in conflict with the decisions of several other Circuits. The First, Second, Fourth, Seventh, Tenth, and Eleventh Circuits hold that money-laundering is an after-the-fact offense and is not a continuing offense. The Tenth Circuit interpreted the nature of a § 1957 offense as suggesting that Congress viewed such a violation as occurring only *after* the individual gained possession or disposal of the proceeds generated by the criminal activity; as did the Eleventh Circuit in agreeing that the underlying criminal activity must be complete before money-laundering can occur; the First and Fourth Circuits are in accord. In contrast, the Fifth Circuit affirmed the district court's holding that money-laundering was a continuing offense.

The Petitions should also be granted because the decision of the Court of Appeals is in conflict with this Court's decisions in *United States v. Cabrales*, 524 U.S. 1 (1998) and *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). These cases hold that the existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct — defendant's money-laundering activity — occurred after the fact. Even though these cases of this Court were urged to the Fifth Circuit, that court affirmed the district court's holding declaring money-laundering to be a continuing offense.

The question presented by this issue is of constitutional dimension. Article III of the Constitution requires that "[t]he Trial of all Crimes . . . shall be held in the state where the said crimes shall have been committed." Its command is reinforced by the Sixth Amendment's requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." It is a question worthy of this Court's attention to finally put to rest the erroneous contention that venue for money-laundering may be proper anywhere the underlying offense continued to occur.

Petitioners would show that they have met the standard for issuance of a certificate of appealability. They have demonstrated that the questions raised on these two issues "are debatable among jurists of reason; that a court *could* resolve the issue [in a different manner] or that the questions are adequate to deserve encouragement to proceed further." *Ransom v. Johnson*, 126 F.3d 716, 720 (5th Cir. 1997), *cert. denied*, 522 U.S. 944, 118 S. Ct. 361 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). In each issue Petitioners have made a substantial showing of the denial of a federal right. *Barefoot* at 893; *Lozada v. Deeds*, 498 U.S. 430, 432 (1991). A certificate of appealability should have issued for both the venue and *ex post facto* issues.

Petitioners were tried in Louisiana where Oak Tree Savings Bank (OTSB) was headquartered. The loan transaction which formed the basis for all the substantive counts occurred exclusively in California. None of the funds came into Petitioners' hands until the funds arrived in Texas. The indictment charged the funds were transferred "from a domestic bank in Houston, Texas." The district court posited that the money-laundering counts were part of a continuing criminal offense, and were properly before the court. [App. B at 8a].

Other circuits squarely disagree with the Fifth Circuit's analysis of this important issue of federal and constitutional law:

> But the statute does not make money laundering a continuing offense. The statutory language and legislative history indicate that each transaction or transfer of money constitutes a separate offense. *See* Senate Report No. 433, 99th Cong. 2nd Sess. 12-13 (1986); *U.S. v. Conley*, 826 F. Supp. 1536, 1543-44 (W.D. Pa. 1993) (concluding that unit of prosecution is "each individual financial transaction.").

United States v. Kramer, 73 F.3d 1067, 1072 (11th Cir. 1996).

The Fifth Circuit has already determined the critical portion of this issue in its opinion in this case on its original appeal. *United States v. Dupre and Sellers*, 117 F.3d 810, 821- 22 (5th Cir. 1997), wherein it wrote:

> The bank fraud charged in Count 2 was complete when Lomas and OTSB, through Chicago Land Title Company, transferred the funds in question to Sellers' account in Houston, Texas. The crime was complete and *the funds became "criminally derived property" when they come under Sellers' control*. Therefore, counts 7-15, which stemmed from the subsequent wire transfers of funds to appellants' accounts in Cayman Island and throughout the United States, properly charged money laundering for purposes of §1957.

Id. (internal citations omitted) (emphasis added).

In its Order, the district court sought to harmonize this case with *Cabrales* by positing that the money-laundering counts were part of a continuing criminal offense. The Court concluded that where the launderer acquires the funds in one district and transferred them to another, venue can be proper in either district. Accepting the Court's rationale, the issue would appear to be whether Petitioners transferred funds from the Eastern District of Louisiana to another jurisdiction within the meaning of the money-laundering statute.

United States v. Piervinanzi, 23 F.3d 670, 677 (2nd Cir. 1994), *cert. denied*, 513 U.S. 900, 115 S. Ct. 259, interpreted the salient portions of 18 U.S.C. § 1957(a). In *Piervinanzi*, the defendant contended his actions did not come within the provisions of § 1957. The Second Circuit noted that the starting point for interpreting a statute is the plain meaning of the statute's language. *Id.* Unless otherwise defined, statutory words will be interpreted as taking their ordinary and common meaning. *Id.* At issue in *Piervinanzi* and in this case is whether the alleged money-laundering offense falls within the statutory language, or whether Petitioners "obtained" the "criminally derived property" in the Eastern District of Louisiana within the meaning of § 1957(a)(2).

As noted in *Piervinanzi*, "the ordinary meaning of the word 'obtained' entails possession of a thing." *Id.* at 677. Similarly, the word "property" implies ownership, or the "exclusive right to possess, enjoy, and dispose of a thing." *Id.* The use of this language demonstrates that the proceeds of a crime must actually be in the defendant's possession before he can attempt to launder them. *Id.*; *see also United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992).

Both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity. *United States v. Lovett*, 964 F.2d 1029, 1042 (10th Cir. 1992) (stating "Congress intended [§ 1957] to separately punish a defendant for monetary transactions that follow in time the underlying specified unlawful activity that generated the criminally derived property in the first place.")

Clearly the money or "property" (as defined herein) was not "obtained" (as defined herein) and was not "possessed, enjoyed, or disposed of" by the Petitioners until they received it in Houston Texas.

United States v. Mullens, 65 F.3d 1560, 1564-65 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112, 116 S. Ct. 1337, held that "possession" is defined as deposited in the defendant's account, "[o]nce deposited, the funds met the definition 'of laundered funds' under 18 U.S.C. 1956(a)." The first deposit by Petitioners of any proceeds was in Houston, Texas, as clearly stated in the indictment. Simply put, Petitioners did not have "possession" of the money until it was deposited into the Houston bank accounts (as previously determined by the Fifth Circuit in *United States v. Dupre and Sellers*, *supra*).

In *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992), the Tenth Circuit, in overturning the defendant's conviction for money-laundering, similarly interpreted the nature of a 18 U.S.C. § 1957 offense as "suggest[ing] Congress viewed a violation of § 1957 as occurring only *after* the individual . . . gained possession or disposal of the proceeds generated by the criminal activity." *Id.* at 568.

> In each of these cases we concluded that Congress intended to impose separate punishments for the money-laundering transactions and for the underlying criminal activity.
>
> * * *
>
> Congress aimed the crime of money laundering at conduct *that follows in time* the underlying crime. . . .

Id. at 569 (emphasis added); *See also United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3037 (1992); *United States v. Lovett*, 964 F.2d 1029 (10th Cir. 1992). Similarly the Eleventh Circuit in *United States v. Christo*, 129 F.3d 578, 580-81 (11th Cir. 1997), agreed that "the underlying criminal activity must be *complete* before money laundering can occur." (emphasis in original).

The main issue in a money-laundering charge, therefore, is determining *when* the predicate crime [bank fraud] becomes a "completed offense," *after which* money-laundering can occur. *United States v. Kennedy*, 64 F.3d 1465, 1477-78 (10th Cir. 1995). A bank fraud offense is not complete until there is an "execution" of the scheme to defraud. The execution is completed by the movement of money from the financial institution. *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States v. Lilly*, 983 F.2d 300, 304-05 (1st Cir. 1992).

Oak Tree Savings Bank lost nothing through the bank fraud until it paid the money to Chicago Title in California. Chicago Title paid the money to Lomas Financial in Dallas,

Texas, and then Lomas paid the money to Sellers and Dupre in Houston, Texas. Only then did the Petitioners gain control of the money to wire transfer it to other accounts — *the steps necessary to constitute money-laundering.*

United States v. Mankarious, 151 F.3d 694, 703-05 (7th Cir. 1998), *cert. denied*, 525 U.S. 1056, 119 S. Ct. 621, confirmed the case holdings that stand for the rule that the predicate offenses must produce proceeds *before* anyone can launder these criminally derived proceeds. Cases use the language of time to describe the relationship of money-laundering and the predicate offense. These cases state that the predicate offense must be "completed" or "earlier" or "antecedent" to the money-laundering. *Id.* at 703; *See, e.g., United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998) (stating the money-laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds actually laundered." *Id.* at 1776).

United States v. Brennan, 183 F.3d 139, 144 (2nd Cir. 1999) emphasized the right of the accused to be prosecuted where the crime was committed:

> As the Supreme Court has recently reiterated, "[T]he *locus delicto* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, 1242, 143 L.Ed.2d 388 (1999), quoting *United States v. Cabrales*, 524 U.S. 1, 6-7, 118 S. Ct. 1772, 141 L.Ed.2d 1 (1998). In doing so we look at the "key words which define the criminal offense in the statute. . . ." Prosecution under the mail fraud statutes is permissible only

> in those districts in which a prescribed act occurs, *i. e.*, in which the defendant "places," "deposits," "causes to be deposited," "takes," or "receives" mail.

Id. at 147.

The money-laundering statute, § 1957, clearly permits prosecution only where the acts occurred — where Petitioners received the money and then laundered it by wire transfer — Houston, Texas.

II.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO VENUE CONFLICTS WITH A PRIOR DECISION OF THIS COURT, AND OTHERWISE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW.

The decision of the Fifth Circuit conflicts with a controlling opinion of this Court. In *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), a unanimous court determined that the proper venue for a section 1957 money-laundering count was appropriate in the venue where the money-laundering occurred; *not where the underlying crime occurred. Id.* at 1775. Money-laundering is essentially an "after the fact" crime.

In *Cabrales*, the laundered money derived from the unlawful distribution of cocaine in Missouri, while the laundering all occurred in Florida. *Id.* at 1774. The Court succinctly stated, "[t]hat the money came from Missouri is of no moment," and affirmed the Eighth Circuit's decision

to uphold the trial court's dismissal of the indictment. *Id.* at 1775. Prior to *Cabrales*, the Fourth, Seventh and Ninth Circuits had held that venue was proper in the district where the funds were unlawfully generated. *Id.*

The Supreme Court decision in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, (1999) is also instructive. This cased involved the question of venue in a firearm/violent crime prosecution. In *Rodriquez-Moreno*, The Supreme Court dealt with 18 U.S.C. § 924(c)(1), which provides in relevant part:

> Whoever, *during and in relation* to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishments provided for such crime of violence . . . be sentenced to imprisonment for five years.

The Petitioner in *Rodriquez-Moreno* was tried and convicted in New Jersey under this statute. Petitioner argued that because he used the firearm solely in Maryland, venue for this crime was improper in New Jersey. The Third Circuit accepted this argument, and reversed. The Supreme Court granted certiorari to resolve an apparent conflict between the Third Circuit and the Fifth Circuit in *United States v. Pomranz*, 43 F.3d 156 (5th Cir. 1995), *cert. denied*, 526 U.S. 275, 116 S. Ct. 513.

In reversing the Third Circuit, the Supreme Court compared its 1998 decision in *United States v. Cabrales* to *Rodriguez-Moreno*. The Supreme Court was careful to distinguish the result in *Rodriguez-Moreno*:

> By way of comparison, last term in *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), we considered whether venue for money laundering, in violation of 18 U.S.C. §§ 1956(a)(I)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundered transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." *Cabrales*, 524 U.S. at 7, 118 S. Ct. 1772. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct — defendant's money laundering activity — occurred " 'after the fact' of an offense begun and completed by others." Ibid. *Here, by contrast, given the "during and in relation to"* language, the underlying crime of violence is a critical part of the § 924(c)(I) violation.

Rodriguez-Moreno, 526 U.S. at 280 n.4, 119 S. Ct. 1239. (emphasis added). This further illustrates the separate nature of the money-laundering offense, which, in this case, occurred exclusively in Houston, Texas.

It is impossible to argue that the Petitioners ever received possession any money in Louisiana, where they were tried. Proper venue could only be had in Houston, Texas. Petitioner respectfully requests the issuance of a Writ of Certiorari to resolve this important issue of federal law.

III.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO THE RETROACTIVE APPLICATION OF THE *WELLS* DECISION CONFLICTS WITH THIS COURT'S PRIOR PRECEDENT DEALING WITH THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* APPLICATION OF INTERVENING JUDICIAL DECISIONS TO PENDING CASES.

Even before the enactment of Federal Constitution's amendments known as the Bill of Rights, some specific limitations on governmental power were incorporated into the Constitution. One of those limitations, imposed by the Constitution on the Federal government (in Art. I, § 9, cl. 3) and on the states (in Art. I, § 10, cl. 1) consisted of prohibiting the passage of what had been known as "*ex post facto*" laws — literally, laws passed "after the fact." *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715 (1990).

Starting with the opinion of Justice Chase in the seminal case of *Calder v. Ball*, 3 U.S. 386 (1798), the Supreme Court has recognized four basic types of retrospective changes in penal law which are prohibited by the *ex post facto* clauses — enactments which ". . . (4) alter the legal rules of evidence so as to allow conviction upon less or different proof than the law required at the time an offense was committed." For a detailed citation of such cases pertaining to (4) see Annotation *Ex Post Facto* Clauses, 131 L. Ed. 2d 1043 at § 4(e), 1069-71.[1]

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1. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say,

(Cont'd)

In *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446 (1987) the court held that in order for a statute to fall within the Federal Constitution's prohibitions against *ex post facto* laws, the statute must disadvantage the offender affected by it, must alter substantial personal rights, and must be more onerous than the prior law. Similarly, the Supreme Court held in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597 (1995) the focus of an inquiry under the Constitution's *ex post facto* clause is not on whether a legislative change produces some ambiguous sort of disadvantage, but on whether any such change alters the definition of criminal conduct.

Legislative enactments retrospectively eliminating a defense to a criminal charge are invalid under the *ex post facto* clause of the Federal Constitution. The criminal quality attributable to an act, by the legal definition of the offense, should not be altered after the fact to the disadvantage of the accused. *Dobert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977). Further, a law which alters the legal rules of evidence so as to require less or different proof than the law required at the time of commission of an offense, in order to convict

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(Cont'd)

> retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. . . . In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption. . . . Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.

Carmell v. Texas, 67 Crim. L. Reporter 166 (Aug. 30, 2000).

the offender, is an *ex post facto* law. A legislature, by simply labeling a law procedural, cannot immunize it from scrutiny under the *ex post facto* clause. *Collins v. Youngblood*; *Miller v. Florida*, *supra*.

Although the *ex post facto* clauses of the Federal Constitution have been held to apply to legislation, there is precedent that similar restrictions apply, as a matter of due process, to judicial changes in the law. *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964). In *Bouie*, the Court noted that (1) an unforeseeable judicial enlargement of a criminal statute, applied retrospectively, operated precisely like an *ex post fact* law; and (2) if a state legislature was barred from passing such a law, then it must follow that a state court was barred by the due process clause of the Constitution's Fourteenth Amendment from achieving the same result by judicial construction. Similarly, the court in *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990 (1977), in rejecting the retroactive application of a judicially created obscenity standard, noted that the principle on which the *ex post facto* clause is based — namely the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — was fundamental to the concept of constitutional liberty and, as such, was protected against judicial action by the due process clause of the Constitution's Fifth Amendment.

In Petitioners' case, the government conceded that materiality was an element of the § 1014 counts at the time of trial by including it as an element in the indictment. The district court included this element in its jury instructions although it told the jury it was for the court to decide.

Wells v. United States, 519 U.S. 482, 117 S. Ct. 921 (1997), was not decided until February, 1997, after the indictment and trial of Petitioners. Although *Wells* removed materiality as an element from § 1014, it is undisputed that materiality was an element of § 1014 when Petitioners were tried for the crime. After *Gaudin* and before *Wells*, in 1996, the Fifth Circuit decided (on the second rehearing) in *United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996), that §§ 1014 and 1344 would require the government to prove and *the jury to find materiality*. *Id.* at 1061 (stating "Count 1 conspiracy convictions required materiality findings insofar as they rested on substantive § 1014 false statement and § 1344 bank fraud offenses, which have up to now clearly incorporated a materiality element.")

Petitioners objected to the refusal of the district court to submit the issue of materiality to the jury and in lieu thereof Petitioners submitted proposed instructions for the court to allow the jury to determine the issue of the materiality element. *Jobe* underscores that *Wells* changed the elements of § 1014 to omit materiality *after* Appellants' trial had concluded. *Jobe*, 101 F.3d at 1061. Prior to *Wells*, every circuit court had included materiality as an element of § 1014. It was not within the Fifth Circuit's power to retroactively apply the holdings in *Wells* to Petitioners.

One ought not to be punished if one reasonably relies upon a judicial decision later held to have been erroneous. The better view is that it is a defense that the defendants acted in reasonable reliance upon a judicial decision later held to be invalid or erroneous. W. LA FAVE AND A. SCOTT, *Substantive Criminal Law*, § 5.1 at 591 (1986).

Petitioners made materiality the cornerstone of their defense, as was initially recognized by the district court. [App. B. at 16a]. In preparing their defense, they relied heavily on the fact that *every* Circuit Court of Appeals recognized materiality as an element of § 1014 at the time of their indictment and trial.

In *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990 (1977), the Supreme Court faced a similar problem of changing law. In *Marks*, the defendants were charged with violating a federal statute outlawing the transportation of obscene materials. *Id.* at 991. At the time the conduct occurred, controlling case law included a test that material was not pornographic unless it is "utterly without redeeming social value." *Id.* at 992 (citing *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S. Ct. 975 (1966)). Prior to trial, the Supreme Court altered this test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), which adopted a test inquiring into "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* The defendants were tried on the more stringent *Miller* test, and convicted. The *Marks* court held that trying the defendants on the more stringent *Miller* test was unconstitutional, and reversed for a new trial. *Id.* at 995. Prior to addressing the substantive issue of whether the new *Miller* standard could be retroactively applied, the Supreme Court crystallized that *judicial action* falls within the *Ex Post Facto* Clause limitation. *Marks*, 430 U.S. at 191-92, 97 S. Ct. 992-93 (explaining that Fifth Amendment protections of due process prohibit retroactive application of judicial decisions affecting individual's right of fair warning of criminal conduct). As *Marks* explained, "[a]n unforeseeable *judicial* enlargement of criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I § 10 of the Constitution forbids." *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 1703).

In finding that the more stringent *Miller* test could *not* be retroactively applied, the Supreme Court summarized its reasons with:

> We therefore hold . . . that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller v. California*, to the extent those standards may impose criminal liability for conduct not punishable under *Memoirs*. Specifically, since the petitioners were indicted for conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."

Id. at 995.

Marks is indistinguishable. Petitioners were indicted at a time when 18 U.S.C. § 1014 included materiality. Materiality should have been submitted for the jury's consideration; the failure to do so was clear *Gaudin* error. The fact that *Wells* changed the elements of § 1014 after Appellants were tried and convicted should remain fundamentally irrelevant to the analysis, as *Marks* teaches that it cannot be retroactively applied. Doing otherwise would result in a continuing infringement of Petitioners' due process rights, and a violation of the Constitution's prohibition against *ex post facto* laws.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JUNE 30, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31294
USDC No. 93-CR-327-2-C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT DUPRE,

Defendant-Appellant.

Consolidated with

No. 99-31295
USDC No. 93-CR-327-1-C

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

W. HAROLD SELLERS,

Defendant-Appellant.

Appendix A

Appeal from the United States District Court
for the Eastern District of Louisiana

ORDER:

After federal prisoners Robert Dupre and W. Harold Sellers ("the appellants") filed an unsuccessful 28 U.S.C. § 2255 motion, the district court granted a certificate of appealability ("COA") enabling them to appeal certain specified issues. Dupre and Sellers now seek an expanded COA to appeal the following claims, which were not certified by the district court: 1) the application of *United States v. Wells*, 519 U.S. 482 (1997), to their case on direct appeal violated the Ex Post Facto Clause; 2) venue was improper on the money-laundering counts of the indictment; 3) cumulative errors regarding the Government's misconduct at trial invalidated their convictions; 4) the sentencing judge misapplied the sentencing guidelines; and 5) the trial court improperly instructed the jury. They also assert that the district court erred in failing to hold an evidentiary hearing.

The appellants have failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). Accordingly, their request for an expanded COA is DENIED. The clerk of this court is directed to issue a briefing notice enabling the Government to respond to the appellants' brief on the certified issues.

Sellers' motion for leave to file a supplemental brief, seeking to "amplify" the arguments raised in the appellate brief, is DENIED. *See* Fed. R. App. P. 28(j); 5th Cir. R. 28.5. The appellants' motion to expedite appeal is also DENIED.

Appendix A

COA DENIED; MOTIONS TO SUPPLEMENT AND EXPEDITE DENIED; ISSUE BRIEFING NOTICE.

s/ E. Grady Jolly
E. GRADY JOLLY
UNITED STATES CIRCUIT
JUDGE

APPENDIX B — ORDER AND REASONS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED JULY 7, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 93-327
SECTION "C"

UNITED STATES OF AMERICA

VERSUS

W. HAROLD SELLERS & ROBERT DUPRE

ORDER AND REASONS

The matter is before the Court on petitions by Harold Sellers and Robert Dupre to vacate their convictions and sentences pursuant to 28 U.S.C. § 2255. No evidentiary hearing is necessary and for the following reasons, the motions are DENIED[1].

The defendants raise numerous issues concerning the trial and sentencing. Each are considered below.

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1. The Court treats all of Sellers' claims as adopted by Dupre and vice versa. To the extent they are separately argued, they are separately identified.

Appendix B

Prosecutorial Misconduct — Intimidation/Inducement of Government Witnesses (Dupre 1(a)(b))[2]; Sellers VI(A)(1-4))

Dupre/Sellers claim that co-defendant Michael Barrack and government witness John Ohanian were improperly induced to testify through promises of leniency from the government, in violation of 18 U.S.C. § 201. In addition, they allege that Ohanian was induced/intimidated into pleading guilty to 18 U.S.C. § 215, an offense of which he could not have been legally convicted as he was not an "agent" of a financial institution.

The defendants acknowledge that the Fifth Circuit has rejected the argument that prosecutors violate 18 U.S.C. § 201 when they confect plea agreements with potential government witnesses. *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998), *cert. denied*, __ U.S. __, 119 S.Ct. 1795 (1999)[3]. Dupre correctly notes that the underlying assumption of *Haese* is that the government is procuring "truthful" testimony when it tenders leniency, an assumption about which this Court has doubts, but which has been nonetheless generally accepted by the Fifth Circuit. Dupre attempts to distinguish *Haese* on the basis that in this case the government pressured Ohanian into testifying falsely that he was an "agent" of Oak Tree Savings Bank. The Fifth

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2. The Court is referencing Dupre's Memorandum. His Motion lists the claimed errors in a different order.

3. Since the Fifth Circuit perceives no impropriety in such agreements, there is no plain error in allowing the related testimony into evidence (Sellers VI(4)).

Circuit has previously held on Dupre's direct appeal that the evidence was sufficient to establish that Ohanian acted as an agent of Oak Tree Savings Bank. This Court agrees[4]. Since the evidence was sufficient to establish Ohanian's agency relationship with Oak Tree Savings Bank, any testimony to that effect was not false.[5] As a result, the plea agreement reached with Ohanian is valid under *Haese*.

Suppression of Brady Material (Sellers VI(B))

Sellers alleges the government suppressed exculpatory material, most particularly a 1989 Oak Tree Savings Bank examination report and other work papers of government witness Ernie Vossler. This issue was previously raised in the defendant's Motion for New Trial. It is reurged in conjunction with the defendant's other allegations of government overreaching, such as the alleged improper plea agreement with Ohanian. The argument is rejected for the reasons stated in the Court's ruling on the Motion for New

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4. Dupre relies upon principles of corporate law seeking to distance Ohanian from Oak Tree Savings Bank. Regardless of whether Ohanian also was an employee/officer/agent of Landmark Land of California, the evidence was sufficient to show that he was also acting on behalf of Oak Tree Savings Bank.

5. Dupre also argues that a federally insured financial institution was not involved in the transaction, claiming that the dealings were between LaJolla on the one hand and Landmark Land Corporation and Oak Tree Mortgage Corporation on the other, neither of which were federally insured (1(c)). A variation of this same argument was made on direct appeal in challenging the venue for the trial. Based on the same evidence cited there, federally insured Oak Tree Savings Bank was clearly the party disbursing the loan.

Trial as well as the reasoning herein and hereafter regarding the propriety of the government's conduct.

Intimidation of Defense Witness (Dupre 2; Sellers VI(C))

Dupre/Sellers intended to call former Louisiana Banking Commissioner Ken Pickering as an expert witness on the laws and regulations regarding banking institutions. Prior to his testifying, the government advised that he was under federal investigation for unrelated matters which might to be used to impeach him on cross-examination. The Court reviewed the basis for the government's proposed cross-examination and informed Pickering of his possible exposure to questioning. Pickering elected not to testify. Dupre/Sellers allege this was improper intimidation and imply that because Pickering was not subsequently indicted, the claim of other investigations was bogus. This issue was raised during the trial and also on appeal. As then, this Court finds that the other investigations were bona fide and were not confected in order to dissuade Pickering from testifying. While the Court does not doubt the government made the disclosure to discourage Pickering from testifying, the disclosure was of factually correct information, namely the ongoing independent investigation. Indeed, bad the government not made the disclosure and simply waited until cross-examination to confront Pickering with the impeachment evidence, the defense may well have accused the government of impropriety for sandbagging the witness unfairly.

The Court finds that none of the alleged efforts, singly or cumulatively, justify vacating the conviction (Sellers VI(D)).

Appendix B

Improper Venue (Sellers VII)

Sellers claims that the Eastern District of Louisiana was an improper venue for the money laundering counts of the indictment, citing *United States v. Cabrales*, 524 U.S. 1 (1998). In *Cabrales*, the high court decided that the proper venue for the money laundering count involved in that ease was where the money was laundered as opposed to where the underlying crime occurred. However, the defendant in that case had had no involvement in the underlying offense. Rather, the defendant's sole involvement was in another jurisdiction in assisting with the laundering of the funds. The Supreme Court noted, however, that a continuing offense might be involved, triable in more than one place, if the launderer had acquired the funds in one district and transferred them to another. In this case, Sellers was convicted of acquiring the funds from a Louisiana financial institution, through fraud and false statements, then laundering them in another jurisdiction. This constitutes a continuing type offense, triable in Louisiana as well as other jurisdictions.

Sentencing Guidelines — Money Laundering — "Heartland" (Dupre 3; Sellers VIII(A)(1))

Dupre/Sellers claim that a downward departure from the sentencing guidelines is warranted because the money laundering offenses fall outside the "heartland" of money laundering crimes. The Court views the laundering of money obtained in large scale frauds such as this one to fall within the "heartland" of money laundering crimes, even if drug trafficking and organized crime are not involved. A downward departure was not warranted.

Appendix B

Sentencing Guidelines — Overstated Loss (Sellers VII(A)(2))

Sellers argued that the loss calculation for the Sentencing Guidelines was too harsh, and that multiple external factors caused the loss. The loss calculation, however, was based solely on the amount of money the defendants improperly siphoned off and laundered. The Court finds no error in using those figures as the basis for the calculations.

Sentencing Guidelines — Intent to Repay (Sellers VII(A)(3))

Sellers argues that a downward departure from the Sentencing Guidelines is warranted because of his alleged intent to repay the Oak Tree Savings Bank loan. The Court accepts, for purposes of argument, that had business gone on as usual, Sellers would have ultimately repaid the loan in some fashion in order to continue his questionable operations. That intention, however, does not negate the fact that he fraudulently obtained substantial funds for his own use from the loan. No downward departure is justified.

Sentencing Guidelines — Cumulative Factors (Sellers VII(A)(4))

Sellers cites various factors he argues justifies a downward departure, including the time already spent in prison, disbarment and payment of the restitution. These factors do not justify a downward departure in this case.

Appendix B

Structural Errors — Jury Instructions — "Risk of Loss" (Sellers IX(A)(1))

Sellers cites a number of alleged errors in the jury instructions, to which he did not object at time of trial. As a result, to warrant reversal, the errors must be so serious as to make the decision of guilt unreliable. *United States v. Olano*, 507 U.S. 725 (1993). Such an error is a "structural" error since it underlines the validity of the trial itself.

Sellers alleges such error in the Court's instruction on bank fraud, specifically its failure to elaborate on the meaning of "risk of loss."

Sellers has failed to cite any case, and the Court has failed likewise to find any ease, in which this jury instruction was found to be inadequate. Courts routinely cite "risk of loss" as an aspect of a bank fraud charge without any elaboration. See, for example, *United States v. Holley*, 23 F.3d 902 (5th Cir.), *cert. denied*, 513 U.S. 1083 (1994); *United States v. Barakett*, 994 F.2d 1107 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994). The cases cited by Sellers all deal with motions for judgment of acquittal, not challenges to the jury instructions. As already noted by the Fifth Circuit and concurred in by this Court, the evidence here was more than sufficient to sustain the bank fraud convictions.

The Court finds no error in the instruction, much less a structural error.

Appendix B

2. *Structural Errors — Jury Instructions — "Failure to Disclose"* (Sellers IX(A)(2))

Sellers claims the Court failed to define how criminal liability could arise from a failure to disclose, arguing that the jury could have found him guilty without finding that he knew of the information that should have been disclosed.

The Court did not give an express "failure to disclose" instruction. The Court did however advise the jury of what the specific allegations of the government were — with respect to Count 4, that the defendants misrepresented the purchase price of a parcel of land; Count 5, they misrepresented the amount needed to refinance a loan and Count 6, they misrepresented the intended use of release collateral. The Court also instructed the jury that an element of the offense was making statements knowing that they were false. Finally, the Court gave a theory of the defense instruction, which had been submitted by the defense, and also a good faith instruction.

The Court finds no error in the jury instructions with regard to the issue of failure to disclose, much less structural error.

3. *Structural Errors — Jury Instruction — Fiduciary Duty* (Sellers X(A)(3))

Sellers contends that the jury instructions allowed the jury to convict Sellers on the sole basis of breach of a fiduciary relationship without a showing of a tangible harm. He cites in support several cases dealing with persons who

did occupy specific fiduciary obligations toward other parties.

This case did not involve breach of a special fiduciary obligation and the Court doubts the word even appears in the jury instructions. The defendants were convicted, in essence, of ripping off Oak Tree Savings Bank by, in part, misrepresenting the monies that were needed to refinance a loan and to purchase the Upper Etiwanda properties. Oak Tree Savings Bank was harmed at the time by expending monies that it could have invested elsewhere had they not been deceived.

That the Bank ultimately — and fortuitously — recouped its money does no absolve the defendants of their criminal conduct.

The Court finds no error, much less structural error, in the jury instructions on this issue.

4. *Structural Errors — Jury Instruction — Fraudulent Intent* (Sellers X(A)(4))

Sellers cites alleged error in failing to instruct the jury that in order to have fraudulent intent, Sellers had to intend some actual harm or injury to Oak Tree Savings Bank.

The jury was specifically advised that in order to convict the defendants, the jury had to find that they intended to commit fraud and intended to defraud Oak Tree Savings Bank. Intent to defraud was defined and a good faith instruction was given, as well as a theory of the defense.

Appendix B

As noted above, the defendants intended to take from Oak Tree Savings Bank, by fraud and deceit, money belonging to Oak Tree Savings Bank to which the defendants were not entitled. This was the theory of the government's case and the evidence supported it.

The Court finds no flaw in the jury instructions, much less structural error.

5. *Structural Errors — Jury Instruction — Materiality — False Statements* (Sellers X(A)(5))

Sellers claims structural error in the failure of the Court to submit the issue of "materiality" to the jury with respect to the false statement counts. 18 U.S.C. § 1014.

At the time of trial, binding Fifth Circuit precedent dictated that materiality was an element of a Section 1014 violation but that it was an issue of law to be decided by the judge, not the jury. Subsequent to Sellers' conviction, and while his case was on appeal, the United States Supreme Court held that "materiality" was an element of an 18 U.S.C. § 1001 violation and as an element of the offense, had to be given to the jury to decide. *United States v. Gaudin*, 515 U.S. 506 (1995). Sellers assumes that *Gaudin* likewise required that the issue of materiality be submitted to the jury in an 18 U.S.C. § 1014 charge.

The Court finds that Sellers assumes too much. *Gaudin* dealt with a different false statement statute which, significantly, expressly required that the falsification or concealment concern a "material" fact. This clear language

led the unanimous court to conclude that it was an element that the jury needed to decide. Sellers was convicted under 18 U.S.C. § 1014, which contains no such requirement that the false statement concern a material fact. *Gaudin*'s rationale, therefore, is simply inapplicable. This was made clear in *United States v. Wells*, 519 U.S. 482 (1997), just two years after *Gaudin*, where the same court, by a 8-1 decision, held that materiality was *not* an element of an 18 U.S.C. § 1014 violation. The high court's rationale included the fact that the statute itself made no mention of materiality.

On direct appeal, the Fifth Circuit rejected Sellers' argument on the basis of *Wells*. Sellers complains that the Fifth Circuit inappropriately applied *Wells* to retroactively overrule *Gaudin*. He cites *United States v. Marks*, 430 U.S. 188 (1977) and *United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999), in support. This Court concludes, for the reasons stated above, that *Gaudin* was and is simply inapplicable to a Section 1014 violation. Consequently, under the prevailing Fifth Circuit law at the time of Sellers' Section 1014 violations and at the time of his trial, the issue of materiality was not for the jury to decide. At the time of Sellers' appeal, the issue of materiality had been eliminated by the United States Supreme Court entirely as an element of a Section 1014 offense.

The jury instructions as to materiality with regard to the false statements counts, even though arguably technically erroneous in light of *Wells*, were not prejudicial and do not constitute structural error.

Appendix B

Structural Errors — Conspiracy (Sellers First Supplement (1))

Sellers argues that since the instruction as to false statements was erroneous for failing to give the issue of materiality to the jury, the conspiracy count is likewise flawed since it included the false statement charges. Since the Court finds no prejudicial error in the instruction given in the 18 U.S.C. § 1014 counts, no prejudicial error occurred in the conspiracy count on that basis.

Structural Errors — Bank Fraud (Sellers First Supplement (2) & Correspondence of 6/22/99)

Sellers argues that the Court's instruction regarding the bank fraud counts was erroneous because it failed to charge the jury that they had to find "materiality" in the defendants' fraudulent conduct. He cites the recent United States Supreme Court decision, *Neder v. United States*, __ U.S. __, 119 S.Ct. 1827 (1999), which held that materiality *is* an element of bank fraud, 18 U.S.C. § 1344. As a matter of substantive law, such a holding is retroactive to cases on collateral review. *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989); *United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997). Presupposing for purposes of this ruling that the *Olano*, *supra*, analysis of plain error is appropriate for collateral review, the Court agrees that the failure to include materiality as an element for the jury to decide in the bank fraud counts was error under *Neder*. The Court also assumes for purposes of this ruling that even though the error was not clear or obvious at the time of trial, nor upon direct appeal, that it is sufficient if it is clear or obvious now, on

collateral review. The next question is whether the error affected the substantial rights of the defendant. The Court finds that failing to instruct the jury as to an essential element of an offense affects the substantial rights of the defendant. The last consideration is whether the forfeited error "seriously affects(s) the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

This last factor is the most difficult. This Court candidly sides with the dissenters in *Neder* who contended that the failure to submit an essential element of a crime to the jury for consideration should never be viewed as harmless error. Theirs was the minority view, however. The majority held that the defective instruction was subject to harmless error review. The Court found the error to be harmless in Neder's case because materiality was not a contested issue at trial and the evidence of materiality in fact was overwhelming.

In this case, materiality was *the* issue at trial. The defense was that the agents of Oak Tree Savings Bank relied entirely upon their own analysis, appraisals and conclusions with respect to the financial transactions in question and not upon the representations by the defendants. The defense theory, in a nutshell, was that Oak Tree Savings Bank's representatives made their own independent decision as what the projects were worth and as long as the defendants' demand fell within that range, the transactions would be approved, regardless of any other information provided by the defendants.

On the other hand, the evidence supporting the defense theory was weak. A false statement is material if it has

"a natural tendency to influence, or (is) capable of influencing, the decision of the decision making body to which it was addressed." *Gaudin*, 515 U.S. at 509. The unquestionably false representations made by the defendants certainly had a tendency to influence or be capable of influencing the decision of Oak Tree Savings Bank to approve the full amount of the loan and later approve the partial withdrawal of the collateral to the loan. It is not necessary that Oak Tree Savings Bank rely solely on the defendants' misrepresentations in approving the transactions, only that the misrepresentations play an influential part. The defendants cannot plausibly argue, for example, that Oak Tree Savings Bank would have approved loaning them $55.8 million to refinance the Lomas loan had it known that Lomas had discounted the debt by $3 million discount, so that $52.8 million was actually owed. While the transaction may well have been attractive enough to Oak Tree Savings Bank to fund the higher amount, if it found to be necessary to close the transaction, it does not follow that they would have chosen to simply pour another $3 million into the defendants' pockets as lagniappe had they known the truth. No juror could reasonably come to that conclusion. Hence, the misrepresentations were material. The same conclusion applies to the misrepresentations regarding the use of the withdrawn collateral.

Under the standard of review called for by binding jurisprudence, the failure of the Court to instruct the jury that materiality was an essential element of the bank fraud counts was neither plain nor structural error.

Appendix B

Accordingly,

IT IS ORDERED that the motion to vacate sentence pursuant to 28 U.S.C. § 2255 filed by W. Harold Sellers and the motion to vacate conviction pursuant to 28 U.S.C. § 2255 filed by Robert Dupre are DENIED.

New Orleans, Louisiana, this 7 day of July, 1999.

s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT
JUDGE

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
NO. 93-327
SECTION: C
REF: C.A. 99-0428

UNITED STATES OF AMERICA

VERSUS

W. HAROLD SELLERS

JUDGMENT

Considering the order and reasons on file and entered by the Court herein denying the motion filed by petitioner W. Harold Sellers to vacate sentence pursuant to 28 U.S.C. §2255, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that the motion to vacate sentence pursuant to 28 U.S.C. §2255 is hereby DENIED.

New Orleans, Louisiana, this 7 day of July 1999.

s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED AND FILED SEPTEMBER 24, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 93-327
SECTION "C"

UNITED STATES OF AMERICA

VERSUS

W. HAROLD SELLERS & ROBERT DUPRE

ORDER AND REASONS

The matter is before the Court on motions filed by Harold Sellers and Robert Dupre for reconsideration the denial of their motions to vacate their convictions and sentences pursuant to 28 U.S.C. § 2255. The defendants' motions for reconsideration, filed as original motions, with three supplements, are DENIED for the reasons previously stated and for the following additional reasons.

In ruling on the defendants' original motion to vacate the sentence, this Court concluded that the holding of *Neder v. United States*, 119 S.Ct. 1827 (1999), that materiality is an element of bank fraud under 18 U.S.C. §1344, is retroactive to cases on collateral review because it dealt with a matter of substantive law. In this regard, the Court likely

erred. As noted on the original appeal in this case, the Fifth Circuit had already previously required that the government prove that statements made in a §1344 fraud charge be material. *United States v. Dupre*, 117 F.3d 810, 815 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 857 (1998); see also *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995); *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993); *but see also United States v. Henderson*, 19 F.3d 917 (5th Cir.), *cert. denied*, 513 U.S. 877 (1994). The change rendered by *Neder* was to affirm that conclusion and to additionally require that the determination of materiality be made by the jury, not the judge.[1] This is similar to the change rendered by *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed. 2d 444 (1995). In *Gaudin*, the Supreme Court held that since materiality was an element in the offense of making a false statement under 18 U.S.C. §1001, it was a question for the jury, not the judge, to decide. In *United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997), the Fifth Circuit concluded that *Gaudin* made a procedural and not a substantive change in the law. The court held that *Gaudin* did not change what the government must prove, since materiality had always been an element of §1001, but simply changed the party to whom the proof must be made — from judge to jury. Since this was a procedural, not a substantive, change in the law, it

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1. The Court does not recall making a determination of materiality as to the bank fraud counts in this case specifically, but the Court did find that the false statements made under the 18 U.S.C. §1014 counts were material. Since the actual misrepresentations were the same in the bank fraud and false statement counts, no prejudice is shown by any failure to make a specific finding as to the bank fraud counts.

triggered an analysis under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989). Under *Teague*, a new procedural rule is not retroactive to cases on collateral review unless it falls into two narrow exceptions. The first exception, dealing with certain kinds of private conduct, was clearly inapplicable. The other exception allows for retroactive application of new rules when they deal with procedures "implicit in the concept of ordered liberty"; "watershed rules of criminal procedure" that are "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. 307, 311, 313, 109 S.Ct. at 1073, 1076, 1077. The Fifth Circuit then concluded that requiring the government to prove materiality to the jury rather than the judge was not a "watershed" rule of criminal procedure. Hence, the holding of *Gaudin*, that materiality was a matter for the jury to decide, rather than the judge, was not retroactive to cases on collateral review.

This matter comes before the Court on collateral review. For the same reasons as in *Shunk*, the decision in *Neder* is not retroactive to cases in this procedural posture.

While the Court has denied the defendants' motion for reconsideration, the Court does consider the issue sufficiently new and undeveloped to warrant a Certificate of Appealability to the Fifth Circuit.[2]

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2. The Court does modify its prior ruling, however, as to the issue of materiality, having erroneously designated it as "the" issue in this case. While the issue of materiality was raised on appeal and now on collateral review, the Court overstated its significance at trial. The defense at trial, as set forth in a "Theory of the Defense"

(Cont'd)

Accordingly,

IT IS ORDERED that the motions for reconsideration filed by W. Harold Sellers and Robert Dupre are DENIED.

New Orleans, Louisiana, this 24th day of September, 1999.

s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

(Cont'd)
instruction given to the jury, was that (1) the defendants did not have negotiations with, nor did they obtain a loan from, a federally insured institution, and (2) the representations made by the defendants to Oak Tree Savings Bank were made in good faith and were believed by them to be true at the time. The Court also instructed the jury in detail as to the defense of good faith. Understandably, the issue of materiality was not emphasized since at the time of trial, that issue was for the Court, not the jury, to decide.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING MOTION FOR RECONSIDERATION DATED AND FILED AUGUST 8, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31294

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT DUPRE,

Defendant-Appellant.

No. 99-31295

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

W. HAROLD SELLERS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Appendix D

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

A member of this panel previously denied the appellants' motion for expanded certificate of appealability. The panel has considered the appellants' motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX E — RELEVANT STATUTES

18 U.S.C. § 1014

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. . . .

Appendix E

18 U.S.C. § 1957

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

* * *

(f) As used in this section —

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.